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No. 96-1291

In the Supreme Court of the United States

OCTOBER TERM, 1996

DOLORES OUBRE, PETITIONER

v.

ENTERGY OPERATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner's failure to tender back severance payments to her employer constitutes ratification of a waiver of claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, notwithstanding the fact that under the ADEA, as amended by the Older Workers Benefits Protection Act (OWBPA), 29 U.S.C. 626(f), any waiver must be knowing and voluntary, and must satisfy specifically enumerated statutory prerequisites that were not met by the waiver in this case.

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INTERESTS OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case arises out of an action brought by an employee under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, alleging that she was constructively discharged on account of her age. The court of appeals summarily affirmed the district court's ruling that petitioner's claim under the ADEA is barred. The lower courts' rulings were based on circuit precedent holding that, although a release of claims executed by an employee does not, by itself, constitute a knowing and voluntary

waiver of claims within the meaning of the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f), an employee's ADEA claim is nonetheless waived if the employee retains severance payments that were made in conjunction with the release. In the view of the courts below, retention of severance benefits ratifies an earlier, otherwise invalid, ADEA release and is not subject to the requirements of the OWBPA. The court of appeals' ruling thereby substantially affects the statutory scheme fashioned by Congress to govern older workers' rights under the ADEA.

The Equal Employment Opportunity Commission (EEOC) has a strong interest in ensuring that the ADEA and the OWBPA are correctly interpreted to serve their intended purposes. The EEOC has primary responsibility for administering and enforcing the ADEA and has an interest in the effectiveness of the entire congressional plan for eradicating age discrimination, including private actions by employees that further the purposes of the ADEA. The Court has recognized that "[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA." *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995). Ensuring that private litigants retain their full rights under the OWBPA to pursue ADEA claims thus furthers the mission of the EEOC to enforce the ADEA.

The ADEA's prohibition against discrimination on the basis of age extends to federal agencies. 29 U.S.C. 633a. Thus, the United States, as an employer, is bound by the OWBPA's provisions regarding waivers under the ADEA.

STATEMENT

1. The ADEA makes it unlawful, *inter alia*, for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;" or "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(1) and (2).

In 1990 Congress amended the ADEA by enacting the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978. Title II of the OWBPA (§ 201, 104 Stat. 983) added a new subsection (f) to Section 7 of the ADEA, 29 U.S.C. 626(f), which now provides, in relevant part, that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. 626(f)(1). Section 7(f)(1) further mandates that "a waiver may not be considered knowing and voluntary unless at a minimum," the following specific requirements are met: the waiver must be part of an agreement written in a manner calculated to be understood by the average individual (29 U.S.C. 626(f)(1)(A)); the waiver must "specifically refer[] to rights or claims arising under [the ADEA]" (29 U.S.C. 626(f)(1)(B)); the waiver cannot cover rights or claims that may arise after the date the waiver is executed (29 U.S.C. 626(f)(1)(C)); in exchange for the waiver, the employee must receive consideration in addition to that which he or she is already entitled (29 U.S.C. 626(f)(1)(D)); the employee must be advised in writing to consult with an attorney before executing the agreement (29 U.S.C. 626(f)(1)(E)); the employee must be given 21 days within which to consider the

agreement (or 45 days if the waiver is in connection with a termination program offered to a group of employees) (29 U.S.C. 626(f)(1)(F)(i) and (ii)); the agreement must provide that the employee can revoke the agreement within seven days after its execution and that the agreement shall not become effective or enforceable until after that period (29 U.S.C. 626(f)(1)(G)); and, if the waiver is in connection with a termination program offered to a group of employees, the employer must (at the commencement of the 45-day period required under 29 U.S.C. 626(f)(1)(F)) inform the employee in writing of certain information about all the persons covered by the program (including their ages) (29 U.S.C. 626(f)(1)(H)(i) and (ii)).

Section 7(f)(2) of the ADEA (also added by the OWBPA) specifies that the only exception to the Section 7(f)(1) prerequisites for a knowing and voluntary waiver of an ADEA claim is a waiver that is "in settlement of a charge filed with the [EEOC], or an action filed in court by the individual or the individual's representative," alleging age discrimination under Sections 4 or 15 of the ADEA. 29 U.S.C. 626(f)(2). In such instances, a waiver "may not be considered knowing and voluntary unless at a minimum," the first five requirements of Section 7(f)(1) are met (*i.e.*, 29 U.S.C. 626(f)(1)(A) through (E)), and the employee is given a reasonable period of time within which to consider the settlement agreement. 29 U.S.C. 626(f)(2)(A) and (B). In any dispute regarding whether the statutory minimum requirements have been met, "the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2)" of Section 7(f). 29 U.S.C. 626(f)(3).

2. a. Petitioner, Dolores Oubre, was employed by respondent, Entergy Operations, Inc., from 1987 until

the beginning of 1995. Resp. C.A. Br. 6-8. In the fall of 1994, respondent implemented a new employee evaluation process that annually ranked its salaried employees in one of nine groups. Br. in Opp. 2. On January 17, 1995, petitioner's supervisors notified her that she had been ranked in the lowest group. J.A. A18; Resp. C.A. Br. 7-8. They informed her that she had the option either to resign and receive a severance package, or to continue employment pursuant to an action plan that would be developed for her. Br. in Opp. 2. All employees ranked in the lowest group were offered the same option. J.A. A17-A18.[1]

At the January 17 meeting, petitioner was provided a letter that set forth the terms of the severance package offered by respondent. J.A. A18; C.A. E.R. 1-2. Attached to the letter was a release of claims petitioner was required to sign in order to receive the severance benefits. C.A. E.R. 4. Neither the letter nor the release specifically referred to claims or rights arising under the ADEA, as required under 29 U.S.C. 626(f)(1)(B).[2] The letter notified petitioner that she was required to sign the release and return

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[1] Petitioner asserts (Pet. 2, 12) that respondent's program mandated that ten percent of its employees be ranked in the lowest group. Petitioner also contends (Pet. 2-4) that persons ranked in the lowest group were informed that if they were ranked in the lowest group the following year as well, they would be subject to termination without any severance pay. And, petitioner alleges (Pet. 3-4) she was told by supervisors that, although an action plan would be developed for her during that following year, it would be virtually impossible for her to move out of the lowest-ranked group even if she met all the goals of the plan.

[2] The release, nonetheless, purported to apply to all claims, occurring on or before the date of the execution of the release "which in any way relate to" petitioner's "employment" with, or "separation" from, respondent. C.A. E.R. 4.

it no later than February 1, 1995, or the severance benefits would no longer be available to her. *Id.* at 2. Thus, petitioner was not afforded the 45-day period in which to consider the waiver, as required under 29 U.S.C. 626(f)(1)(F)(ii), in connection with a group termination program (or even the 21-day period required in connection with an individual employee termination, see 29 U.S.C. 626(f)(1)(F)(i)). Neither the letter nor the release provided petitioner with information about the other employees covered by the same employee termination program, as required under 29 U.S.C. 626(f)(1)(H). And neither the letter nor the release provided that petitioner could revoke the release during the seven-day period following its execution or that the agreement would not become effective or enforceable until such period had expired, as required under 29 U.S.C. 626(f)(1)(G).

On January 31, 1995, petitioner informed respondent that she would accept the severance package, and she signed the release. J.A. A18. Respondent then made the severance payments under the terms of the agreement. J.A. A19.[3]

b. In September 1995 petitioner filed suit in the United States District Court for the Eastern District of Louisiana, alleging that respondent constructively discharged her on account of her age, in violation of the ADEA, 29 U.S.C. 621 *et seq.*, and various state laws. Pet. 2; Br. in Opp. 3. Respondent filed a motion for summary judgment, contending that petitioner had waived her right to bring an action under the ADEA by virtue of having signed the release and having failed to return the severance payments she had received. J.A. A19; Pet. 5. Petitioner opposed the

[3] Petitioner received one month of administrative leave, then one month of base pay plus one week of pay for each year of accredited service; the cash amount paid to her totalled $6,258.62. Resp. C.A. Br. 10-11 & n.4.; Pet. 16; C.A. E.R. 1.

motion, contending that the release did not constitute a knowing and voluntary waiver of her ADEA claim because the release did not comply with the OWBPA and because she was under economic duress at the time she accepted the severance package. Br. in Opp. 3.

The district court entered summary judgment for respondent. J.A. A17-A21. The court found that it was "undisputed that the release signed by [petitioner] did not meet some of [the OWBPA's] criteria, including the requirements that specific reference to ADEA rights be made, that a waiting period of at least 45 days within which to consider the agreement be given and that a seven day period following execution to revoke the agreement be provided." J.A. A20 (citing 29 U.S.C. 626(f)(1)(B) and (F), and (G)). The court noted, however, that the Fifth Circuit previously had held that "the failure to meet the requirements of subsections (A) through (H) of the OWPA does not render the agreement void of legal effect even though not 'knowing and voluntary.' Rather, such waivers are only subject to being avoided at the employee's option." *Ibid.* (quoting in part *Wamsley* v. *Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993), cert. denied, 115 S. Ct. 1403 (1995)). The court reasoned that, "[a]ccording to *Wamsley*, where the employee chooses to retain and not tender back the benefits paid in consideration for the agreement, she manifests an intention to be bound by the waiver and makes a new promise to abide by its terms." *Ibid.* (citing *Wamsley*, 11 F.3d at 540, and *Blakeney* v. *Lomas Info. Sys., Inc.*, 65 F.3d 482 (5th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996)). Concluding that it was "not at liberty to disregard the law announced by the Fifth Circuit," the district court dismissed petitioner's complaint with prejudice. *Ibid.*

3. The court of appeals summarily affirmed. J.A. A22-A23. Stating that it had reviewed the record and the parties' briefs and had found no reversible error, the court of appeals affirmed "for the reasons enunciated by the district court." J.A. 23.

4. Petitioner then filed a petition for a writ of certiorari presenting three questions. On April 27, 1997, the Court granted review limited to the third question presented—"[w]hether the petitioner ratified an otherwise invalid release by retaining compensation paid and/or failing to tender back said sums received pursuant to the terms of her separation of employment, thus making the release binding." 117 S. Ct. 1466; Pet. i.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that an employee is barred from pursuing a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, by virtue of the fact that the employee retains severance payments made in conjunction with a release of claims that does not constitute a knowing and voluntary waiver of ADEA claims under the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f). Section 7(f)(1) of the ADEA, as added by the OWBPA, unequivocally states (1) that an individual "may not waive" any claim under the ADEA unless the waiver is knowing and voluntary and (2) that, in order to be considered knowing and voluntary, a waiver of an ADEA claim must satisfy detailed statutory prerequisites. There is no statutory exception from the Section 7(f)(1) prerequisites for cases in which a person retains severance payments made under a waiver that was not knowing and voluntary.

The plain language and structure of the OWBPA are clear on this point. The common law doctrine of contractual ratification cannot be applied to override the OWBPA's explicit restriction on the waivability of ADEA claims. The history and circumstances surrounding enactment of the OWBPA also demonstrate that Congress did not intend a ratification exception to the OWBPA's waiver prerequisites.

An employee need not tender back severance payments he or she received in conjunction with a purported ADEA waiver prior to pursuing an action under the ADEA. As this Court ruled with respect to an analogous statute in *Hogue* v. *Southern Ry.*, 390 U.S. 516 (1968), a tender back requirement would be inconsistent with the purposes of the ADEA.

ARGUMENT

AN EMPLOYEE DOES NOT WAIVE A CLAIM UNDER THE ADEA BY EXECUTION OF A RELEASE OF CLAIMS AND RETENTION OF SEVERANCE PAYMENTS MADE THEREUNDER, IF THE RELEASE DOES NOT CONFORM TO THE STATUTORY PREREQUISITES FOR A KNOWING AND VOLUNTARY WAIVER OF ADEA CLAIMS UNDER THE OWBPA

There is no question that the release drafted by respondent and signed by petitioner did not include certain terms that are mandated by Section 7 of the ADEA, 29 U.S.C. 626, as added by the OWBPA, to support a knowing and voluntary waiver of claims under the ADEA. See pp. 3-4, 7, *supra*.[4] It is clear from the statutory text, structure, and history of the OWBPA, and from this Court's precedents, that a

[4] There is a dispute, however, regarding whether the release met certain other of the statutory prerequisites, *e.g.*, whether petitioner received consideration to which she was not already entitled. See Pet. 16-17, 19, 23-24; Br. in Opp. 13-14. The courts below did not resolve that issue, and this Court limited its grant of review to the ratification issue.

release that does not meet the requirements of the OWBPA does not constitute a knowing and voluntary waiver of ADEA claims. An employee can pursue an ADEA action in such circumstances, regardless of the retention of severance benefits.

A. The Text and Structure of the OWBPA Establish That, Absent a Waiver That Meets the OWBPA's Prerequisites, Waiver of a Right or Claim Under the ADEA Cannot Occur

1. Section 7(f)(1) of the ADEA, as added by the OWBPA, unequivocally states that an individual "may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. 626(f)(1). Section 7(f) does not leave the term "knowing and voluntary" undefined. It specifically prohibits a waiver from being considered "knowing and voluntary" unless, "at a minimum," the requirements listed in Section 7(f)(1)(A) through (H) are met. The unassailable corollary is that an individual may not waive any claim or right under the ADEA unless the requirements listed in Sections 7(f)(1)(A) through (H) are met.

Under the approach adopted by the courts below, however, employees waive their rights and claims under the ADEA, even absent satisfaction of the statutory requirements, if the employees retain severance payments. The OWBPA, however, permits no such exception to the "knowing and voluntary" waiver prerequisites imposed under Section 7(f)(1).[5] The language and structure of the OWBPA "plainly re-

[5] The only exception to Section 7(f)(1)—set forth in Section 7(f)(2)—applies to cases that involve settlement of a charge that already has been filed with the EEOC or of a case that already has been filed in court (and even then the exception only modifies slightly the prerequisites for a knowing and voluntary waiver). That exception is inapplicable here.

strict[] an employee's freedom to waive his rights or claims under the ADEA." *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993), cert. denied, 511 U.S. 1108 (1994). "[A]fter grappling with the question of whether to permit ADEA waivers at all," Congress enacted the OWBPA prerequisites and stated "unequivocally that unless the enumerated requirements are met, an individual '*may not waive*' ADEA rights." *Long* v. *Sears Roebuck & Co.*, 105 F.3d 1529, 1539 (3d Cir. 1997).

The fact that Congress created only a single exception to the Section 7(f)(1) prerequisites, *i.e.*, for cases pending before the EEOC or in court (29 U.S.C. 626(f)(2)), further reinforces the OWBPA's mandate. Structuring the statute first to list the threshold requirements for a valid ADEA waiver, followed by a single exception, demonstrates that Congress did not intend any other exceptions.

2. Disregard for the OWBPA's clear mandate—that an individual "may not waive" an ADEA claim absent a knowing and voluntary waiver—has been rationalized by the Fifth Circuit under the common law doctrine of contract ratification. The courts below followed Fifth Circuit authority that enactment of the OWBPA in 1990 did not disturb earlier precedent that an employee's retention of severance benefits ratifies an ADEA release. J.A. A20 (citing *Wamsley* v. *Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 536, 540-542 (5th Cir. 1993), cert. denied, 115 S. Ct. 1403 (1995) (applying *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991))). In *Wamsley*, the Fifth Circuit reasoned that: the common law doctrine of contractual ratification of voidable contracts applies to ADEA waivers notwithstanding enactment of the OWBPA; a release that does not constitute a knowing and voluntary waiver under the OWBPA is not void, but is merely voidable; an employee's reten-

tion of severance payments constitutes a choice not to avoid an invalid release and thereby serves as a ratification which is a new promise not subject to the waiver requirements of the OWBPA; and applying the common law doctrine of tender back to preclude an ADEA suit unless an employee returns all severance payments is consistent with the purposes of the ADEA. *Id.* at 538-542; see also *Blakeney* v. *Lomas Info. Sys., Inc.*, 65 F.3d 482, 484-485 (5th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996); *Wittorf* v. *Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir. 1994).[6]

a. The conclusion that an individual may waive ADEA claims through ratification of an invalid waiver flies in the face of the OWBPA's mandate that an individual "may not waive" any ADEA claim unless pursuant to a knowing and voluntary waiver. Regardless of the applicability of the ratification doctrine to ADEA releases in pre-OWBPA cases, "the enactment of the OWBPA changed the legal landscape with respect to the release of ADEA claims. In light of the [OWBPA], * * * the ratification doctrine does

[6] The Fourth Circuit also has applied the contractual ratification theory underlying its pre-OWBPA precedent to an ADEA case that postdates the OWBPA. *Blistein* v. *St. John's College*, 74 F.3d 1459, 1465 (4th Cir. 1996) (applying *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), cert. denied, 502 U.S. 859 (1991)). In *Blistein*, the Fourth Circuit explained that, prior to enactment of the OWBPA, the circuits were split "over how to determine whether an ADEA claim had been validly released"—"[s]everal circuits had adopted a federal common law 'totality of the circumstances' test," while other courts, including the Fourth Circuit in *O'Shea*, "had resorted to ordinary state law contract principles in resolving the question," and it concluded that the OWBPA codified the totality-of-circumstances test. 74 F.3d at 1465. The Third Circuit has recognized—correctly, in our view—that the OWBPA supplants both of the pre-OWBPA tests. *Long*, 105 F.3d at 1538 & nn. 14, 15.

not apply to ADEA releases which fail to comply with the OWBPA." *Long*, 105 F.3d at 1534.

In addition to the plain language of the OWBPA's prohibition on noncomplying waivers, the overall structure of the OWBPA makes clear that application of the common law ratification doctrine to ADEA releases would conflict with that scheme. The prerequisites enacted go well beyond common law principles and require a higher threshold of protection for waivers of ADEA claims. As a structural matter, the OWBPA alters the manner of enforcing an ADEA waiver. Whereas under common law an employee challenging a waiver bore the burden of establishing that a waiver was not knowing and voluntary, the OWBPA imposes on the party asserting the validity of the waiver the burden of proving that the waiver is knowing and voluntary. See *Long*, 105 F.3d at 1539 (citing 29 U.S.C. 626(f)(3)). That approach evidences an intent on the part of Congress to place the risk of nonpersuasion on an employer who is seeking to enforce a waiver, in contrast to ratification which holds an employee to an obligation that an employer could not have enforced.

The specific OWBPA prerequisites to a knowing and voluntary waiver also reflect a displacement of the ratification doctrine. That doctrine simply "is logically inconsistent with the specific terms of the OWBPA." *Long*, 105 F.3d at 1539 n.17. "To conclude otherwise would be to say that Congress only intended that the OWBPA requirements apply to the 'first' waiver." *Id.* at 1539-1540. Indeed, permitting common law ratification would permit an employer to do an end run around the entire statutory scheme.

Thus, the common law doctrine of ratification simply cannot be invoked in disregard of the detailed statutory framework of the OWBPA. Common law principles are "not to be applied in defiance of a stat-

ute's overriding purposes and logic." *United States* v. *Locke*, 471 U.S. 84, 98 (1985). Here, application of the common law ratification doctrine is precluded because it would be incompatible with the statutory scheme of the OWBPA. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104 (1991) (refusing to apply common law doctrine of collateral estoppel to state administrative findings in ADEA case inconsistent with congressional intent underlying ADEA).

b. Permitting application of the ratification doctrine to ADEA waivers that do not comply with the OWBPA also is inappropriate because noncomplying waivers are void, not merely voidable. "The propriety of calling a transaction a voidable contract rests primarily on the traditional view that the transaction is valid and has its usual legal consequences until the power of avoidance is exercised." Restatement (Second) of Contracts § 7, cmt. e (1981). The OWBPA states, however, that an ADEA waiver "shall not become effective or enforceable until" after expiration of the seven-day revocation period following execution of the agreement. 29 U.S.C. 626(f)(1)(G). Thus, an ADEA waiver that does not comply with the OWBPA is not valid and does not have "its usual legal consequences" that a party must choose to avoid. In order to have any legal consequences, an ADEA waiver must meet the OWBPA prerequisites, including surviving a seven-day period during which the employee is afforded the right to revoke it. Absent such circumstances, any purported release of ADEA claims is without legal effect. See *Oberg*, 11 F.3d at 685 (ADEA waiver that does not meet OWBPA prerequisites is "dead by force of law").[7] As such, ratification cannot

[7] The Third Circuit has reasoned that whether noncomplying ADEA waivers are void or voidable is not relevant because, under either characterization, a court still must decide whether an employee's retention of severance benefits should bar his or her ADEA claim or whether tender back is required. *Long*, 105 F.3d at 1537. District courts have taken differing approaches, but a majority of those outside of the Fourth, Fifth and Seventh Circuits have adopted the *Oberg* analysis. *Id.* at 1536 n.12 (citing cases).

occur because "[v]oid promises are not legally binding and thus, are not contracts." *Wamsley*, 11 F.3d at 539 (citing Restatement (Second) of Contracts § 7, cmt. a (1981)).[8]

Moreover, it is far from clear that an employee like petitioner has a "power of avoidance." See Restatement (Second) of Contracts § 7 (1981) (in order to constitute voidable contract subject to ratification, party must have power to avoid legal relations created by contract). The Fifth Circuit's assertion that a noncomplying ADEA waiver is "subject to being avoided at the election of the employee," *Wamsley*, 11 F.3d at 539, cannot be reconciled with the OWBPA's plain statement that "[a]n individual *may not* waive any right or claim under [the ADEA]" unless the waiver complies with the OWBPA's prerequisites. 29 U.S.C. 626(f)(1) (emphasis added). The OWBPA simply does not permit an employee to elect whether to avoid an ADEA waiver that does not comply with the OWBPA.[9]

[8] Contrary to the Fifth Circuit's assertion (see *Wamsley*, 11 F.3d at 539 n.8), Congress' failure to use the term "void" is of no consequence. Providing that an agreement is not effective or enforceable renders the agreement void. And waiver agreements may be deemed void where the relevant statute does not label such agreements "void." *Brooklyn Savs. Bank* v. *O'Neil*, 324 U.S. 697, 710-713 (1945) (absence of statutory language prohibiting waiver of rights under Fair Labor Standards Act does not preclude finding that such waivers are "void as contrary to public policy").

[9] The Fifth Circuit has suggested that, if noncompliance with the provisions of Section 7(f)(1) renders an ADEA release

c. In any event, even if an ADEA waiver that does not comply with the OWBPA could be characterized as merely "voidable," and even if the applicability of the ratification doctrine to ADEA waivers survived enactment of the OWBPA, the Fifth Circuit's approach would still be unsound. There is no support for its conclusion that ADEA claims can be waived through ratification that does not comply with the OWBPA. The Fifth Circuit merely declared, without citation, that an employee's ratification constitutes a new promise and "[a]s a new promise that creates a new obligation, it is not subject to the waiver requirements of § 626, and thus, such requirements

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void, there would be no need for Section 7(f)(1)(G) of the ADEA, 29 U.S.C. 626(f)(1)(G). See *Wamsley*, 11 F.3d at 539. The Fifth Circuit misreads Section 7(f)(1)(G). As explained above, Section 7(f)(1)(G) requires that an ADEA waiver provide the employee with a seven-day period in which he or she is entitled to revoke the agreement, and it provides that the release does not become effective or enforceable until after expiration of that revocation period. Contrary to the premise underlying the Fifth Circuit's interpretation, Section 7(f)(1)(G) does not serve as a safeguard against releases that do not comply with the other provisions of Section 7(f)(1). Section 7(f)(1)(G) does not apply to such noncomplying releases. It does not grant an employee the authority to void a non-complying release because such noncomplying releases already are void. Rather, Section 7(f)(1)(G) applies to agreements that *are* in compliance with all the OWBPA prerequisites and that otherwise meet the statutory threshold for knowing and voluntary ADEA waivers. It permits the employee a short period within which to revoke such an agreement prior to its effective date, for any reason or for no reason, *e.g.*, an employee may change his or her mind based on the other employees who execute the agreement, or he may simply suffer from signer's remorse, quickly changing his mind about the wisdom of the release after he signs it. See *Soliman* v. *Digital Equip. Corp.*, 869 F. Supp. 65, 69 n.14 (D. Mass. 1994).

pose no bar to its enforcement." *Wamsley*, 11 F.3d at 540 n.11.

The Fifth Circuit has acknowledged, however, that "if the same grounds for avoidance exist when the new promise is made, the party again enjoys the power to avoid performance under the new promise." *Wamsley*, 11 F.3d at 539 n.7. It cites the Restatement's discussion of the common law doctrine that, under the ratification doctrine, the "new promise may itself be voidable for the same reason as the original promise, or it may be voidable or unenforceable for some other reason." See Restatement (Second) of Contracts § 85 cmt. b (1981). The Restatement goes on to explain, by way of example, that some States require that in order for a new promise of a former infant to constitute ratification of a promise that was otherwise voidable because entered into while the person was still an infant, the new promise must be in writing and signed. *Ibid.* Similarly, the OWBPA's dictate that an individual "may not waive" an ADEA claim unless the OWBPA's prerequisites are met, applies whether the purported waiver is accomplished by signing a release, or by ratification. Thus, any new promise made through ratification is also subject to the OWBPA.

B. The History Surrounding Enactment of the OWBPA Demonstrates That Congress Did Not Intend Any Ratification Exception To the OWBPA's Waiver Prerequisites

The intent reflected in the OWBPA's clear language, mandating compliance with the statutory prerequisites and not admitting of exceptions therefrom for ratification, is evident from the legislative record.

1. The Senate Report makes clear that a waiver that does not meet the OWBPA's prerequisites is void, of no legal effect. Thus, the OWBPA "provides for the first time by statute that waivers not super-

vised by the EEOC *may be valid and enforceable if* they meet certain threshold requirements and are otherwise shown to be knowing and voluntary." S. Rep. No. 263, 101st Cong. 2d Sess. 31 (1990) (S. Rep. No. 263) (emphasis added). The Senate Report stresses that all statutory prerequisites must be met, regardless of other "knowing and voluntary" considerations. *Id.* at 32. Moreover, it specifies that, because permitting ADEA waivers that were not supervised by the EEOC was a substantial change from past law, the Senate Committee intended "that the requirements * * * be *strictly* interpreted *to protect those individuals covered by the Act.*" *Id.* at 31. (emphasis added).[10]

2. The intent to protect older workers and to ensure that their ADEA claims were not subject to waiver, absent compliance with the statutory prerequisites, could not be clearer from the legislative record. The Senate Report unequivocally states that the OWBPA was intended to "ensure[] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." S. Rep. No. 263 at 5. It specified that the statutory prerequisites to a valid ADEA waiver were included "with the intent of according basic due process protections to employees who are asked to execute waivers." *Id.* at

[10] The legislative record demonstrates that Congress intended the OWBPA to "limit waivers to certain situations and then spell[ed] out clear and ascertainable standards to govern those situations." H.R. Rep. No. 664, 101st Cong., 2d Sess. 27 (1990). That approach was intended to "clarify an unsettled area of the law" and eliminate the litigation that had arisen regarding ADEA releases based on the many different factors and criteria applied in the former case-by-case approaches under the totality-of-the-circumstances test and the state-contract-law test. *Ibid*; see also S. Rep. No. 79, 101st Cong., 1st Sess. 17 (1989); see note 6, *supra*.

32. The circumstances surrounding the enactment of the OWBPA reveal that there was no intent to permit disregard for the restrictions on ADEA waivers through ratification of waivers that failed to afford employees the statutory protections. The OWBPA was enacted against a backdrop that disfavored any waivers of ADEA claims and that led to authorization for certain waivers only because of the statutory protections created.

Prior to enactment of the OWBPA, the EEOC had promulgated a regulation that permitted waivers of ADEA claims without supervision by the EEOC so long as the waivers were "knowing and voluntary." 52 Fed. Reg. 32,293 (1987); 29 C.F.R. 1627.16(c) (1987). The regulation identified factors relevant to the determination whether a waiver is "knowing and voluntary," but the only mandatory requirements were that it not apply to prospective rights or claims and that it not be in consideration for benefits to which the employee was already entitled. *Ibid.*[11]

Almost immediately thereafter, Congress expressed concern about permitting any waivers of ADEA claims and suggested that the EEOC's "rule was without legal foundation and contrary to public policy." H.R. Rep. No. 664, 101st Cong., 2d Sess. 20 (1990) (H.R. Rep. No. 664). Congress suspended operation of the EEOC regulation for fiscal year 1988 and the following two years. See 133 Cong. Rec. H12,392 (daily ed. Dec. 21, 1987); 134 Cong. Rec. H8297 (daily ed. Sept. 26, 1988); 135 Cong. Rec. H7618 (daily ed. Oct. 26, 1989). Notwithstanding Congress's suspension of the regulation, however, some lower courts

[11] The OWBPA ultimately rendered the EEOC's rule, permitting unsupervised waivers without the protections of the OWBPA, of no force or effect. Pub. L. No. 101-433, § 202(b), 104 Stat. 984 (1990).

ruled that releases were permitted under the ADEA in certain circumstances. H.R. Rep. No. 664 at 21-22.

In 1990, a legislative proposal in the House of Representatives was introduced, similar to one introduced the preceding year, that would have permitted ADEA waivers, but only where the employee already had made a claim under the ADEA—and therefore was fully aware of the rights he or she was waiving. See H.R. Rep. No. 664 at 5, 7, 49-50. Even in such instances, a waiver would have been recognized only if it had been knowing and voluntary and had met certain prerequisites similar to those currently contained in the OWBPA. *Id.* at 5. The House proposal would have prohibited altogether waivers of ADEA claims as part of individual early retirement or early group incentive programs, such as the separation program at issue in this case. *Id.* at 7, 52-54. The House Report explained that older workers can be unfairly forced to waive their ADEA rights, especially in "large-scale terminations and layoffs, where an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force." *Id.* at 22-23.

That House bill eventually gave way to a Senate bill passed later that year. 136 Cong. Rec. S13,611 (daily ed. Sept. 24, 1990); 136 Cong. Rec. H8738 (daily ed. Oct. 3, 1990). The Senate bill permitted ADEA waivers in circumstances not supervised by the EEOC or courts, but the Senate Report emphasizes that, in lieu of supervision, the significant statutory requirements must be met. See S. Rep. No. 263 at 31.[12]

[12] Although the Senate bill was amended in certain limited respects subsequent to the completion of the Senate Report (see, *e.g.* 136 Cong. Rec. S13,607 (daily ed. Sept. 24, 1990)), the provisions relevant in the instant case were not altered.

The Senate bill also permitted waivers in conjunction with early retirement or early group incentive programs, such as the program at issue in this case. It imposed additional requirements in such circumstances, however, regarding the information that must be provided by the employer to support a valid waiver. S. Rep. No. 263 at 6. The Senate Report notes the special issues that arise in the context of group termination and reduction programs, and emphasizes that, in such instances, "the need for adequate information and access to advice before waivers are signed is especially acute." *Id.* at 32. As opposed to individual separation agreements, the terms of group programs generally are not subject to negotiation between the parties and the affected employees who are unlikely to have a reason to suspect that the action is based on their individual characteristics. *Ibid.* The Senate Report explains that

> [t]he principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

Id. at 34.

Application of the ratification doctrine to ADEA waivers that do not comport with the OWBPA's statutory prerequisites would contravene this intended congressional design. An employee who signs a purported ADEA waiver that does not afford him the protections intended by Congress under the OWBPA would, nonetheless, be bound by that otherwise invalid waiver if the employee decided to keep the severance benefits paid to him. But the fact that an employee,

such as petitioner, retains benefits paid as part of a group termination program, does not establish that the employee has obtained any of the information about the other employees covered by the program as mandated by the OWBPA or that any other protections of the OWBPA have been afforded the employee.

3. The legislative history of the OWBPA contains no reference to the doctrine of contractual ratification or to case law that invokes that doctrine. *Long*, 105 F.3d at 1539 n.17. Apparently, at the time the OWBPA was enacted, no court of appeals had held that an ADEA waiver that was not knowing and voluntary could be ratified through the retention of severance benefits.[13] Moreover, the caselaw relating to

[13] By the time of the enactment of the OWBPA, three reported district courts had discussed the ratification theory in the context of a purported waiver of ADEA rights, although in each instance the court relied on that approach as an alternative theory. See *Constant* v. *Continental Tel. Co.*, 745 F. Supp. 1374 (C.D. Ill. 1990); *O'Shea* v. *Commercial Credit Corp.*, 734 F. Supp. 218 (D. Md. 1990), aff'd, 930 F.2d 358 (4th Cir.), cert. denied, 502 U.S. 859 (1991); *Widener* v. *Arco Oil & Gas Co.*, 717 F. Supp. 1211 (N.D. Tex. 1989). The determinations by the Fourth and Fifth Circuits that retention of severance benefits ratifies an ADEA waiver that is not otherwise knowing and voluntary, postdated enactment of the OWBPA, although both determinations were initially announced in cases to which the OWBPA did not apply because the release predated its enactment. See *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), cert. denied, 502 U.S. 859 (1991); *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). The Eleventh Circuit also addressed the issue in an opinion that followed enactment of the OWBPA and which did not apply the OWBPA because the release predated its enactment, but it reached a result contrary to the Fourth and Fifth Circuit, disagreeing with the ratification analysis of *O'Shea* and *Grillet*. *Forbus* v. *Sears Roebuck & Co.*, 958 F.2d 1036, 1040-1041 (11th Cir.), cert. denied, 506 U.S. 955 (1992).

ADEA waivers that was discussed did not involve any application of the ratification doctrine. See, *e.g.*, H.R. Rep. No. 664 at 26-27 (citing cases).

Congress did, however, consider the issue of an employee's simultaneous retention of severance benefits and pursuit of an ADEA claim. At least one corporation raised the concern that it would have to bear the high costs of litigating ADEA claims even where it had paid significant consideration for releases as part of a departure program. See H.R. Rep. No. 664 at 87 (dissenting views); see also S. Rep. No. 263 at 64 (minority views). Thus, it was understood that the OWBPA would permit an employee who signed an invalid waiver to pursue his or her ADEA claim while retaining the separation benefits paid under the waiver. See *Long*, 105 F.3d at 1540 n.19. At one point a substitute was proposed in committee, apparently in response to that concern. The substitute would have required that, if a waiver "is set aside for any reason, any damages received through a discrimination action *shall be* offset by the consideration received for the waiver," but it was not adopted by the committee. H.R. Rep. No. 664 at 91 (emphasis added); see also *id.*, at 23-30. There was no suggestion that the waiver would have been ratified by the employee's retention of the consideration already received.

C. The Court's Decision in *Hogue* Requires Rejection of the Tender Back Doctrine Under the ADEA

The Fifth Circuit has suggested that, even if the ratification doctrine would not bar an ADEA suit such as petitioner's, the suit is barred because petitioner did not tender back the severance payments she had received in conjunction with the invalid ADEA waiver before she pursued her suit under the ADEA. See *Wamsley*, 11 F.3d at 540-542. That approach is inconsistent with this Court's opinion in

Hogue v. *Southern Ry.*, 390 U.S. 516 (1968) (per curiam).

In *Hogue*, the Court held that an injured employee was not required to tender back the consideration he had received from his employer in exchange for a release of claims before the employee could bring suit under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51 *et seq.* As a threshold matter, the Court made clear that federal law, not state common law principles, controlled the issue. 390 U.S. at 517. The Court concluded that requiring a tender back as a prerequisite to suit under the FELA would be "wholly incongruous with the general policy of the Act," *i.e.*, to provide injured employees a right to recover for injuries negligently inflicted by their employer. *Id.* at 518. The Court ruled, however, that the sum already paid by the employer and retained by the employee must be deducted from the recovery (if any) obtained through a FELA lawsuit. *Ibid.*

The *Hogue* rationale applies with full force to cases under the ADEA. *Long*, 105 F.3d at 1541-1544. Like the FELA, the ADEA is a federal remedial statute designed to compensate employees for injuries caused by their employers' conduct and to deter employers from engaging in such conduct. See *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 357-358 (1995) ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA"). And, like imposition of a tender back requirement under the FELA, imposition of such a requirement under the ADEA would compromise the statute's underlying purposes of compensating victims and deterring employers. A tender back requirement would enable an employer to escape sanction for age discrimination when a terminated employee lacks the resources to tender back his severance benefits prior to filing

suit—a situation not unlikely in the group intended to be protected by the OWBPA. See H.R. Rep. No. 664 at 23. Few individuals suddenly deprived of their job and their income would be able to tender back large severance payments:

> Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect [sic] on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would . . . encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such conduct * * *.

Long, 105 F.3d at 1541-1542 (quoting *Forbus* v. *Sears Roebuck & Co.*, 958 F.2d 1036, 1041 (11th Cir.), cert. denied, 506 U.S. 955 (1992). And employees who do not receive the information required under the OWBPA by the time of the tender decision "would be no better off than before the OWBPA was enacted; they could be forced to make critical decisions [whether to surrender severance pay or waive all claims under the ADEA] without information deemed essential by Congress." *Id.* at 1542. A tender back requirement would render the OWBPA a nullity by "encourag[ing] employers to ignore the specific provisions of the Act in hopes that by the time their former employees discover that the releases that they signed are voidable, they will be in no economic position to tender back or refuse to accept the special severance benefits accorded them." *Oberg* v. *Allied Van Lines, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 769, 773 (N.D. Ill. 1992), aff'd, 11 F.3d 679 (7th Cir. 1993), cert. denied,

511 U.S. 1108 (1994); *Isaacs* v. *Caterpillar, Inc.*, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991).[14]

The fact that the ADEA and its purposes are not identical to the FELA and its purposes does not preclude application of the *Hogue* rationale to ADEA cases:

> The mandate of *Hogue* is that tender back requirements imposed in connection with the release of federal rights be evaluated in light of the general policy of the statute in question. That the ADEA as amended by the OWBPA serves a purpose distinct from that underlying the FELA does not change the fact that a tender back requirement is "wholly incongruous" with the general policies of the ADEA and the OWBPA. In enacting the OWBPA, Congress specifically regulated ADEA releases in order to provide employees with protection not available at common law. To strip them of this protection through application of the common law principle of tender back would be anomalous indeed.

Long, 105 F.3d at 1541 n.22; but see *Wamsley*, 11 F.3d at 542. In *Fleming* v. *United States Postal Serv. AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995), Judge Posner explained that, al-

[14] Respondent's contention (Br. in Opp. 12) that failure to apply the tender back doctrine in ADEA cases would deter employers from offering severance benefits misconstrues the purposes and effect of the OWBPA. The OWBPA's purpose was to serve as an incentive to an employer to comply with its requirement of a knowing and voluntary waiver, including the OWBPA's statutory prerequisites, when the employer obtains waiver of ADEA claims from their employees. Compliance with the OWBPA's requirements (which an employer has the ability to control through the manner in which it drafts releases and offers severance programs) provides an employer with a defense to a suit alleging violation of the ADEA.

> though tender back generally would be a precondition to rescission of a contract, "[w]hen federal law limits a class of releases, as in cases under the Federal Employers' Liability Act, or the closely parallel Jones Act, or the Age Discrimination in Employment Act, each of which regulates releases, * * * the common law rule requiring tender * * * may have to give way." *Id.* at 261.[15] Moreover, although the *Fleming* court questioned the breadth of the rule precluding tender back under any federal law limiting releases, it emphasized that "*[o]f course* a worker who has executed a void release should not be barred from challenging it by his inability to tender back the consideration received, as the effect would be to make the release enforceable as a practical matter." *Ibid.* (emphasis added).[16]

[15] The *Fleming* court declined to exempt Title VII from a tender back requirement because, in its view, *Hogue* cannot "be detached from its context, that of a federal statute that regulates releases, displacing common law rules." 27 F.3d at 261-262. By so ruling, the court expressly disagreed with *Botefur* v. *City of Eagle Point*, 7 F.3d 152, 155-156 (9th Cir. 1993). That disagreement is of no consequence in the instant case, however, because the OWBPA is "precisely such a statute" that regulates releases, displacing common law rules. *Long*, 105 F.3d at 1540 n.20.

[16] The Fifth Circuit's concern (*Wamsley*, 11 F.3d at 539 n.9) that, absent a tender back requirement, employees will finance their lawsuits against employers with funds provided by the employers, ignores the nature of the statute at issue. The class of employees protected by the OWBPA is one of the groups least likely to have the luxury of expending the funds received (usually severance benefits) on litigation expenses rather than living expenses because of the unlikelihood of their finding new employment and the possibility that they may not yet be entitled to Social Security or other retirement benefits. See H.R. Rep. No. 664 at 23; see also *Long*, 105 F.3d at 1543. And, of course, any employees "with baseless claims have

The Third and Seventh Circuit both have expressly held that "analogizing the policy of [the] ADEA to that of [the] FELA, and thus applying *Hogue*, is correct." *Oberg*, 11 F.3d at 684; *Long*, 105 F.3d at 1541-1542; see also *Forbus*, 958 F.2d at 1040-1041 (applying *Hogue* in context of invalid ADEA release that predated OWBPA); *Isaacs* v. *Caterpillar, Inc.*, 765 F. Supp. at 1367.[17] Indeed, courts regularly have extended the reasoning of *Hogue* outside the context of FELA, including to statutes that are not as analogous to FELA as is the ADEA. See *Smith* v. *Pinell*, 597 F.2d 994, 996 (5th Cir. 1979) (Jones Act, 46 U.S.C. 688); *Botefur* v. *City of Eagle Point*, 7 F.3d 152, 156 (9th Cir. 1993) (42 U.S.C. 1983; noting that *Hogue* "is generalizable to suits under other federal compensatory statutes"); *Wahsner* v. *American Motors Sales Corp.*, 597 F. Supp. 991, 998 (E.D. Pa. 1984) (Automobile Dealers' Day in Court Act, 15 U.S.C. 1221 *et seq.*; emphasizing that benefits under federal statute may not be denied by state common law rules, and

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strong financial incentives to keep severance payments rather than risk them in prolonged litigation." *Ibid.* Further, respondent itself states that it is "undisputed that the overwhelming majority of plaintiffs enter into contingent fee arrangements with their lawyers, whereby the costs of litigation are taken from the ultimate recovery." Br. in Opp. 12. Attorney's fees are available as part of the award in an ADEA suit. *McKennon*, 513 U.S. at 357.

[17] A panel of the Sixth Circuit also has considered the question of tender back, albeit apart from the issue of ratification (which was not yet ripe due to the remand of the question whether the release complied with the OWBPA). *Raczak* v. *Ameritech Corp.*, 103 F.3d 1257 (1997). The majority of that panel held that the employees were not required to tender back the consideration they had received as a precondition to maintaining their suit under the ADEA. *Id.* at 1268-1270 (opinion of Jones, J.); *Id.* at 1071 (opinion of Guy, J.).

ruling that plaintiffs did not ratify their releases by failure to tender back); *Home Box Office, Inc.* v. *Spectrum Elecs., Inc.*, 100 F.R.D. 379, 382 n.1 (E.D. Pa. 1983) (communications laws); *Taxin* v. *Food Fair Stores, Inc.*, 197 F. Supp. 827, 830-831 (E.D. Pa. 1961) (antitrust law); see also *Long*, 105 F.3d at 1541 n.21 (citing cases).

As in *Hogue*, severance benefits retained by the employee may be offset against any recovery in the ADEA suit. See *Hogue*, 390 U.S. at 518. The ADEA gives federal courts "the discretion to 'grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act].'" *McKennon*, 513 U.S. at 357-358. It may be appropriate for a court to offset initial benefits paid to a particular employee against the ADEA award to that individual to the extent the two are duplicative, so long as the relief ultimately granted effectuates the purposes of the ADEA. See *Long*, 105 F.3d at 1543; *Oberg*, 11 F.3d at 684.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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